**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**
**REGION THIRTEEN**

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| THE RITZ-CARLTON CHICAGO | ) | |
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| Charging Party, | ) | |
| | ) | Case No.: 13-CB-19622 |
| and | ) | |
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| UNITE HERE LOCAL 1 | ) | |
| | ) | |
| Respondent. | ) | |

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# THE RITZ-CARLTON CHICAGO'S BRIEF IN OPPOSITION TO THE UNION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECEMBER 5, 2011 FINDINGS AND RECOMMENDED ORDER

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## I. INTRODUCTION

The Hotel filed a Charge alleging that UNITE HERE Local 1 ("Local 1" or the "Union") refused to bargain over multiple issues in violation of Section 8(b)(3) of the National Labor Relations Act and contrary to the parties' September 16, 2009 Memorandum of Understanding (the "Me Too Agreement") (Jt. Ex. 2)[1] regarding their current contract negotiations. Specifically, the parties' dispute centers around whether the Me Too Agreement required them to bargain over nine separate issues or only three as the Union argues.

At the August 1, 2011 hearing before Administrative Law Judge Buxbaum, the Union did not present any evidence relating to the merits of the Hotel's refusal to bargain allegations. Instead, the Union contended that this dispute must be deferred to arbitration pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and declined to address the merits. The Union had previously filed a motion for summary judgment arguing that the matter must be deferred. Although the Board denied that motion on July 29, 2011, it did so without prejudice to the Union's right to renew the argument at the hearing. Inexplicably, although the Union did renew that argument at the hearing, it declined to present any new evidence or argument in support of its position beyond what was raised in its failed motion for summary judgment.

After a full hearing on the merits, during which all parties were provided the opportunity to present evidence and testimony in support of their respective positions, the ALJ ruled on December 5, 2011 that the dispute should not be deferred to arbitration and that the Union had repudiated the Me Too Agreement by unlawfully refusing to bargain in violation of Section 8(b)(3) and Sections 2(6) and (7) of the Act.

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[1] References to the transcript of the August 1, 2011 hearing are designated as "Tr. __." References to the General Counsel's exhibits, Employer's exhibits, and the Union's exhibits offered at the hearing are designated as "GC Ex. __," "Er. Ex. __," and "U. Ex. __," respectively. Joint exhibits introduced at the hearing are designated as "Jt. Ex. __."

On December 28, 2011, the Union submitted 19 separate exceptions to the ALJ's decision. In sum, the Union argues that: (a) the ALJ was required to rule on its deferral argument before proceeding to a hearing on the merits, and he erred in finding that the dispute is not suitable for deferral; (b) the ALJ erred in ruling that the Union ignored the requirements of the Me Too Agreement, that it repudiated the agreement and that it is hostile to bargaining; and (c) the ALJ erred in ruling that the Union agreed to bargain over nine issues rather than three. The Union's exceptions find no support in the factual record or in relevant law and accordingly, the ALJ's sound ruling must be upheld in its entirety.

## II. RELEVANT FACTS

### A. The Parties

The Ritz operates a luxury hotel located at 160 E. Pearson Street in Chicago, Illinois. (GC Ex. 1(a)). The Hotel employs approximately 500 employees, many of whom are represented for purposes of collective bargaining by Local 1. (*Id.*). The Union 1 has represented employees at the Ritz for over twenty years. (Tr. 63).

### B. Local 1's Bargaining History with Hotels in Chicago

There are a large number of Chicago hotels whose employees are represented by Local 1, including properties operated by the Hilton, Hyatt and Starwood hotel chains, as well as individual properties that are not affiliated with these chains. (Tr. 65-66). Prior to 2006, the hotels in Chicago bargained with Local 1 as a multi-employer group. (Tr. 65). However, shortly before negotiations for the 2006-2009 contract began, the Union advised the multi-employer group that if the Hilton hotel chain was part of the group, the Union would not bargain with it. (Tr. 65). As a result, the Hyatt and Starwood properties in Chicago all withdrew from the multi-employer group to engage in their own separate negotiations with the Union. (Tr. 65).

Accordingly, the Union would now engage in three separate negotiations – with Hilton, Hyatt and Starwood, respectively. (Tr. 65-66).

As noted above, there are a number of Chicago hotels that are not affiliated with any of the three major chains. Rather than each of those individual hotels engaging in its own contract negotiations with Local 1, they instead agreed to a "me too" approach whereby they would all adopt and be bound by whatever contract terms were eventually negotiated between Local 1 and the Sheraton Chicago (one of the Starwood properties). (Tr. 65). The Union subsequently entered into "me too agreements" with those hotels, which memorialized their agreement to piggyback on the Sheraton's 2006-2009 contract and forego direct negotiations with Local 1. (U. Ex. 2).

**C. Chicago Hotel Negotiations in 2009**

The 2006-2009 Sheraton agreement, along with the related me too agreements (including the Ritz's contract, referred to henceforth as the "CBA"), expired on August 31, 2009. (Jt. Ex. 1; U. Ex. 1). As it did in 2006, Local 1 sought to engage in separate negotiations in 2009 with Hilton, Hyatt and Starwood, and encouraged the hotels that were not affiliated with those chains to enter into another me too agreement and adopt the Sheraton Chicago's eventual contract. Throughout July of 2009, Local 1 approached the hotels that had signed me too agreements during the 2006 negotiations and asked them to do the same in connection with the imminent negotiation of the 2009-2013 contracts. (Tr. 67).

**D. The Ritz Seeks To Engage In Limited Bargaining with Local 1**

In 2009, the Ritz determined that in several areas it was providing employees with benefits and/or levels of benefits that far exceeded what it was required to provide by the contract, which put it in a competitive disadvantage compared to other local hotels. (GC Ex. 2;

Tr. 69). The Ritz identified nine specific areas where it was exceeding its contractual obligations and providing non-competitive benefits, including:

| Subject | Extra-Contractual Benefits Being Provided |
|---|---|
| Carving/Specialty Stations | Employees who worked carving/specialty stations at banquet events received a $65 premium for working those stations; the contract only required a $25 premium. The Hotel also engaged in inefficient scheduling practices that led to excessive overtime related to carving station assignments. |
| Bell Attendants | Attendants received $5 from the Hotel each time luggage was delivered to a vacant room; other hotels were paying $2.50. |
| Staff Cafeteria Cooks | Two cooks were assigned to the Hotel's staff cafeteria as their "home" department; all other cooks assigned to the Hotel's main kitchen as home department. |
| Private Bar (aka "minibar") | Room Attendants assigned to replenish the minibars in guest rooms were only required to complete 80-90 rooms per shift; other hotels were assigning far more rooms per shift. |
| Housekeeper Scheduling | Housekeepers being paid for 8 hours per shift, but were only being scheduled and required to work for 7.5 hours on each shift. |
| Premium for Roll-away beds | Contract required that Room Attendants be paid a minimum of $1.50 for each roll-away bed they made up; Hotel was paying $2 per roll-away, and was making that payment to <u>any</u> employee who made one up, not just Room Attendants. |
| Housekeeping Room Quota | Hotel was imposing lower daily room quota requirements on Housekeepers than the contractual daily quota. |
| New Employee Pay Rate | Hotel was paying new employees at a higher hourly rate than the contractual minimum hourly rate for new employees. |
| Beverage Manager Position | Hotel maintained a bargaining unit position of Beverage Manager; this position has been eliminated in most other hotels.[2] |

[2] This table summarizes the information contained in GC Exhibit 2.

The Ritz decided to pursue negotiations with the Union to bring its practices in these nine areas back in line with the contract language and make itself more competitive. (Tr. 70). Importantly, the Hotel did not want to independently negotiate an entire contract with the Union, and as such was willing to sign a me too agreement as it had in 2006. (Tr. 74-75). However, the Hotel feared that doing so would preclude it from negotiating over the nine items listed above. (Tr. 74-75). Indeed, Section 11 of the existing contract was a Maintenance of Benefits clause (which the Hotel expected to be included in the 2009-2013 agreement), and that clause would prevent the Hotel from altering its practices in any of the nine areas absent negotiation over such changes. (Tr. 136-137; Jt. Exh. 1). Accordingly, the Hotel's General Manager, Michele Grosso, instructed one of its outside counsel, Kyle Johansen, to advise the Union that it wished to engage in negotiations over the nine issues. (Tr. 70-71). Grosso also provided Johansen with a detailed chart that outlined its current practice in each of the nine areas and the Hotel's proposed changes to those practices. (GC Exh. 2).

At that time, Johansen was also representing Starwood in its Chicago negotiations with Local 1, and in that capacity he met regularly with Local 1's President Henry Tamarin and Vice-President Karen Kent. (Tr. 72). During one of the Starwood bargaining sessions in July 2009, Tamarin approached Johansen during a break to inquire as to why the Ritz had not yet signed a me too agreement. (Tr. 73-74). Johansen advised Tamarin that the Ritz wished to engage in negotiations regarding nine specific areas where it was providing more than what the contract required. (Tr. 74-75). Johansen assured Tamarin that the Ritz was only interested in bargaining over the nine items referenced above, and was not seeking to engage in entirely separate negotiations for its own contract. (Tr. 75). Johansen also told Tamarin that the Ritz was concerned that if it signed the same me too agreement that the other Hotels were signing, it

would be waiving its right to negotiate over the nine issues. (Tr. 74-75). Accordingly, any me too agreement the Ritz entered into would need to reflect that such negotiations would take place.

Tamarin responded that Local 1 was willing to engage in direct negotiations with the Ritz, but expressed concern that doing so would cause a backlash against the Union from other me too hotels. (Tr. 76). Tamarin stated that he was especially sensitive as to how other me too hotels might respond to whatever language was added to the Ritz's me too agreement that was not included in their agreements. (Tr. 76). Tamarin also expressed concern that any remaining hotels that had not yet signed a me too agreement would be able to use the language of the Ritz's me too agreement as a "roadmap" on how to try to extract more from the Union. (Tr. 76).

Tamarin subsequently agreed to meet with the Hotel to address its bargaining request. (Tr. 76-77). The parties met at the Hotel on September 1, 2009, with Grosso and Johansen present on behalf of the Ritz, and Tamarin and Kent attending on behalf of the Union. (Tr. 77). Johansen stated that the purpose of the meeting was to discuss the Hotel's desire to bargain over its practices in nine separate areas where it was exceeding its contractual obligations and suffering a competitive disadvantage. (Tr. 79). Johansen made it clear that he did not expect the Union to negotiate over all those items that same day, nor did he expect the parties to reach an agreement on specific practice changes that day. (Tr. 79-80, 82). Instead, the Ritz wanted to secure an agreement that the parties would negotiate over those nine items in the near future, and wanted to ensure that signing a me too agreement would not preclude them from engaging in such negotiations. (Tr. 79-80).

Johansen then read from the chart that Grosso had provided him, explaining in detail each of the nine specific issues the Ritz wish to bargain over and, where applicable, compared what

the Ritz was seeking with the existing contract language. (Tr. 80-81; GC Exh. 2). Johansen made it clear that the Hotel was still willing to sign a me too agreement as it had in 2006, so long as that agreement explicitly preserved the Ritz's right to negotiate over the nine items. (Tr. 80). The only issues discussed during the meeting were the nine practices in place at the Hotel that exceeded its contractual obligations. (Tr. 103).

Tamarin responded that Local 1 was absolutely willing to bargain over the nine issues, but did not want a specific list of those nine items included in the Ritz's me too agreement. (Tr. 89-90). Tamarin reiterated his earlier concerns that doing so may jeopardize Local 1's relationship with other me too hotels. (Tr. 90). However, at no time during the meeting did Tamarin or Kent indicate that Local 1 opposed bargaining over any of the nine items raised. (Tr. 91). The parties agreed that Johansen would draft the Hotel's proposed revisions to the me too agreement that had been signed by the other hotels. (Tr. 91). As a courtesy to the Union, the Hotel agreed to refer to the nine items generally in the agreement rather than listing them specifically. (Tr. 91).

**E. The Ritz's Me Too Agreement**

The language of the Ritz's proposed agreement was the same as the me too agreements that had been signed by the other local hotels, with the exception of Paragraph III. The Ritz proposed the following language for that paragraph:

> This Memorandum of Agreement shall apply to all existing side letters between the Employer and the Union that were not raised during the parties' September 1, 2009 meeting. Specifically, the parties agree to continue their negotiations in good faith regarding the specific side letters and operations issues unique or pertaining to the Employer **that were raised during the parties' September 1, 2009 meeting** notwithstanding the execution of this Memorandum of Agreement. The parties further agree to keep open those provisions of the Successor Collective Bargaining Agreement that pertain to the specific unique operational issues raised at the September 1, 2009 meeting until those issues are fully resolved. (GC Ex. 3) (emphasis added).

Paragraph III explicitly provided that negotiations over the issues discussed during the September 1, 2009 meeting would continue even though the Ritz was agreeing to adopt the remaining terms of the eventual Sheraton contract. (GC Ex. 3). Per the Hotel's agreement not to list the nine items specifically, Johansen instead referred to them as the "specific side letters and operations issues unique or pertaining to the Employer that were raised during the parties' September 1, 2009 meeting." (GC Ex. 3). This sole purpose of this language was to create a "carve out" for the nine issues that were discussed during the September 1st meeting, thereby obligating the Union to bargain over those issues and insuring the Ritz did not waive its right to engage in such bargaining. (Tr. 88, 98, 130).

With regard to the use of the phrase "unique or pertaining to the Employer" in the draft, it was Johansen's decision to include that language. (Tr. 103). During the September 1, 2009 meeting, Johansen and Grosso had both used the term "unique" to describe the nine issues as they presented them to the Union. (Tr. 103). They used that term to mean "different, paying above scale and a level above scale, any number of things that were beyond the contract." (Tr. 103). In other words, the Hotel used that term during the meeting to refer to the differences between what it was doing in practice and what it was required to do by the language of the contract. (Tr. 103). Accordingly, he used that same language in the me too agreement, since he could not include a list of the nine items. (Tr. 103).

On September 16, 2009, Johansen sent an email to Tamarin and Kent with the Ritz's proposed revisions to the me too agreement attached. (Tr. 92; GC Exh. 3). Shortly thereafter, Tamarin approached Johansen during a break in one of the Starwood sessions to discuss the Ritz's proposed language. Tamarin took issue with the last sentence of Paragraph III, which provided that the parties would agree to keep certain provisions of the contract "open" until the

bargaining over them had concluded. (Tr. 99-100). However, Tamarin did not express concerns related to any other portion of the draft. (Tr. 100).

Johansen discussed Tamarin's concern with the Ritz, and it agreed to remove the last sentence of Paragraph III. (Tr. 101). During a break at a subsequent Starwood bargaining session on September 17, 2009, Johansen presented Tamarin with a revised version of the Ritz's proposed me too agreement reflecting the removal of that sentence. Grosso had already executed the revised draft, and Tamarin signed it when he received it from Johansen. (Tr. 104; Jt. Exh. 2). Accordingly, the agreement (the "Me Too Agreement") was fully executed on September 17, 2009. (Jt. Ex. 2).

Because Local 1 had just commenced separate negotiations with Starwood, Hyatt and Hilton in Chicago, the parties had difficulty scheduling a mutually acceptable date to begin their negotiations over the nine items. Accordingly, they agreed to revisit scheduling once the larger Chicago negotiations began winding down. (Tr. 104).

**F. Negotiations Commence Between The Ritz and Local 1**

The city-wide negotiations with the three major hotel chains took far longer than anticipated, and were still ongoing in August 2010. (Tr. 105-06). By that time, Thomas Posey had replaced Johansen in representing the Ritz in its bargaining with Local 1. (Tr. 153-54). Given that the Starwood negotiations did not appear to be near resolution, the Ritz reached out to Local 1 and requested that the parties commence their negotiations over the nine items. (Tr. 161). The parties subsequently scheduled their first bargaining session for September 24, 2010.

On September 16, 2010, in anticipation of the first bargaining session, Posey sent an email to Kent attaching a set of bargaining proposals. (GC Exh. 4). The Hotel made several

proposals that collectively encompassed all nine of the issues the parties had agreed to bargain over. (Tr. 158; GC Exh. 4).

The parties' first bargaining session (like all subsequent sessions) was held in a conference room at the Hotel. (Tr. 163). Present on behalf of the Hotel were Patrick Ghielmetti (who had replaced Grosso as General Manager), Cecilia Moore (Director of Human Resources) and Posey. Kent and various Union representatives were present on behalf of Local 1. (Tr. 163).

Posey commenced the meeting by giving an opening statement. (Tr. 164-165). He referenced the set of proposals that he had sent to Kent via email on September 16, 2010, as well as the chart of nine items that Grosso had prepared in 2009 (which he read from and referenced specifically during his opening remarks). (Tr. 165). Kent asked a number of questions and made verbal information requests regarding all of the proposals. (Tr.165). At no time during the session did Kent or any other Local 1 representative express that the Union was opposed to negotiating over any of the nine issues raised. (Tr. 167).

**G. The Union's October 11, 2010 Information Request**

On October 11, 2010, Kent memorialized and expanded upon her verbal information requests through a set of written information requests. (GC Exh. 5). Those requests were numbered 1 through 9 and corresponded with the nine issues identified by the Hotel and listed on its September 2009 chart. The Union requested extensive information related to all nine of those issues, and each request contained multiple subparts. For example, Request No. 9 ("Hire in rate") included ten separate information requests regarding the pay rate for new employees. Similarly, Request No. 5 ("Room Attendants") included 11 separate requests for information related to the Hotel's proposal to reduce the roll-away bed premium. The Union requested that

the Hotel provide responsive information in advance of the parties' next bargaining session on October 21, 2010. (GC Exh. 5).

**H. The Union's Refuses To Bargain Over Six Of The Nine Issues**

The parties second bargaining session took place on October 21, 2010. (Tr. 171). Posey opened the meeting by noting that the Hotel had already provided the Union with some of the information requested in its October 11th letter, and then gave the Union additional information responsive to those requests. (Tr. 172). Upon receiving that additional information, Kent requested a break for the Union to caucus, and the parties broke for approximately 40 minutes. (Tr. 172).

When the session reconvened, Kent stated, for the first time, that it was the Union's position that there were not nine items on the table to be bargained over. (Tr. 172). Kent went on to state that the only issues the Union would negotiate over were: (1) elimination of the Beverage Manager position; (2) the room quota for Minibar Attendants; and (3) changing the "home department" of two Cooks from the staff cafeteria to the main kitchen. (Tr. 173-74) Kent added that the Union may consider discussing the carving station proposal in part (to the extent that it addressed carving station scheduling), but would not discuss the carving station fee. (Tr. 173-74).

The only justification the Union offered for its refusal to bargain over the remaining six issues was its assertion that Paragraph III of the Me Too Agreement did not require such negotiation. Specifically, Kent asserted that only issues discussed during their September 1, 2009 meeting that the Union was obligated to bargain over were those that were "unique or pertaining to" the Ritz. The Union argued that six of the nine issues did not fall under that category. (Tr. 173).

In response, Posey strongly disagreed with Kent's position and demanded that the Union bargain over the nine items as it had previously agreed to. (Tr. 175). He noted that the parties had executed the Me Too Agreement over one year ago, and that throughout that period, the Union had never suggested that any of the nine items were not subject to negotiation. (Tr. 176). However, the Union maintained its refusal to bargain over six of the nine issues, and did not make a counter to any of the Hotel's September 24, 2010 proposals regarding those issues. Instead, the Union made a proposal related to an entirely new issue that the parties had never discussed before – proposing the creation of an elaborate cross-training program for the Hotel's cooks.[3] (Tr. 177-78; GC Exh. 6 at p.4).

**I. The Parties Subsequent Negotiations**

The parties engaged in periodic negotiations from November 11, 2010 through early 2011 with regard to the few issues that the Union did not refuse to bargain over. (Tr. 190-200). In most (if not all) of those bargaining sessions, the Hotel reiterated its demand that the Union negotiate with regard to the remaining six issues. (Tr. 232-33). The Union has maintained its refusal to bargain over those six issues, and has not countered the Hotel's September 24, 2010 proposals on those topics.[4]

[3] Although Judge Buxbaum postulated during the hearing that the Union's cross-training proposal may be related to the Hotel's proposal to reassign two Cooks to another "home" kitchen, that proposal was, in fact, unrelated to the reassignment issue and was instead a proposal to enhance "career development" for the many cooks that the Hotel employs (who fall into the four separate job classifications denoted as "Cook 1" through "Cook 4"). (Tr. 210-211).

[4] Moreover, although the Union asserts in its brief that it "continues to have a collective bargaining relationship with the Employer…[and] is willing to engage in collective bargaining," no such bargaining has occurred for several months. Since the ALJ's December 5, 2011 ruling, the Union has failed to respond to the Hotel's requests to schedule further bargaining sessions, so it appears that the Union now refuses to bargain over all nine issues rather than just the six that underlie this dispute.

## III. STATEMENT OF THE ISSUES

The Union has asserted 19 separate exceptions to the ALJ's decision. In addition to asserting the obvious exception that it believes the ALJ erred by ruling that the Union violated Section 8(b)(3) of the Act (Excep. 10), the Union asserts 18 additional exceptions, which all fall into one of three broad categories:

- Deferral Exceptions – The Union argues that the ALJ was required to rule on its deferral argument before proceeding to a hearing on the merits (Exceps. 1, 2), that he erred in finding that the dispute is not suitable for deferral (Exceps. 4, 8), and that he erred in finding that the Board rejected the Union's *Collyer* argument when it denied the Union's motion for summary judgment on that issue (Excep. 3).
- Exceptions Relating to the Union's Conduct – The Union argues that the ALJ erred by holding that it ignored the requirements of the Me Too Agreement (Excep. 5), that it repudiated the agreement (Excep. 6) and that it is hostile to bargaining (Excep. 7).
- Exceptions Relating to the Number of Issues to Be Bargained Over – The Union argues that the ALJ erred in ruling that it agreed to bargain over nine items (Excep. 11). It also argues that the ALJ should have ruled that only three of the nine items are "unique" or "pertain to" the Ritz (Exceps. 12-16). The Union further argues that the language of the Me Too supports a conclusion that the parties agreed to bargain over three rather than nine items (Exceps. 17, 19) and that the Ritz affirmatively accepted that narrow scope of bargaining because it feared repercussions from the Union if it did not (Excep. 18).[5]

[5] The Union also asserts that the ALJ erred by failing to hold that Union bargaining representative Karen Kent offered to arbitrate the parties' dispute over the Me Too Agreement. (Excep. 10). It is unclear why the Union raises this exception; although it is undisputed that Kent made such an offer (Tr. 233), that offer has no bearing on any of the issues material to this dispute.

As explained below in more detail, the Union's exceptions have no merit and provide no basis to overturn the sound reasoning of the ALJ's decision.

## ARGUMENT

### I. The Undisputed Facts Establish That The Union Has Unlawfully Refused To Bargain In Violation of Section 8(b)(3)

At the hearing, the Union declined to offer any evidence that would refute the Hotel's allegation that it has unlawfully refused to bargain. Instead, the Union asserted that its defense would consist solely of the procedural argument that this matter should be deferred to arbitration. Notably, the Board denied the Union's motion for summary judgment on the deferral issue shortly before the hearing began. In its Order, the Board held that the Union "failed to establish that there are no genuine issues of material fact regarding its argument that the complaint allegations should be deferred to the parties' grievance and arbitration procedure," but made its denial "without prejudice to the Respondent renewing its deferral argument before the administrative law judge."

However, rather than offering factual evidence to establish that deferral was warranted, the Union declined to introduce any evidence that related to either deferral or to the merits of the Hotel's allegations. Importantly, although the Union's counsel made various factual assertions in presenting her arguments at the hearing, she did not offer witness testimony or documentary evidence to support those assertions and accordingly, her assertions cannot serve as evidence, let alone establish and/or refute any facts that are material to this dispute.

In light of the undisputed facts established by the Hotel and the General Counsel at the hearing, and the Union's inexplicable refusal to offer any evidence in its defense that would refute those facts, a ruling must be entered against the Union and in favor of the Hotel. Indeed, during the hearing, the Hotel presented undisputed evidence establishing that:

- The Hotel informed the Union in July 2009 that it would not sign a Me Too Agreement unless the Union agreed to negotiate over nine specific issues. (Tr. 74-75).

- During the parties' subsequent meeting on September 1, 2009, the Hotel's representatives explained each of the nine issues in detail and described them as being "unique" to the Ritz, in the sense that they all constituted areas where the Ritz was engaging in a practice that exceeded its own contractual obligations. (Tr. 103).

- The Union agreed to bargain over those issues, subject to two conditions: (1) that the Hotel sign a me too agreement; and (2) that the agreement would not list the nine issues, because the Union feared such a list would cause a backlash from other me too hotels. (Tr. 88-91).

- The Hotel accepted the Union's conditions and drafted the Me Too Agreement, which was fully executed as of September 17, 2009. (Tr. 104; Jt. Ex. 2).

- Paragraph III of the Me Too Agreement provides that the Hotel and the Union agree to "continue their negotiations in good faith regarding the specific side letters and operations issues unique or pertaining to the Employer **that were raised during the September 1, 2009 meeting**." (Jt. Ex. 2).

- The only side letters or operations issues that were discussed during the September 1, 2009 meeting were the nine issues presented by the Hotel. (Tr. 103).

- The only issues that the Hotel subsequently sought to bargain over were the nine issues discussed during the September 1, 2009 meeting. (Tr. 103-04).

- The Union refuses to bargain over six of those nine issues – (1) carving/specialty station fee; (2) Bell Attendants' gratuity; (3) Housekeeper scheduling; (4) roll-away bed premium; (5) Housekeeping daily room quota; and (6) new employee pay rate. (Tr. 173-74).

These facts were all established through sworn witness testimony and documentary evidence, and the Union made no attempt to refute them. To the contrary, the Union did not offer even a scintilla of evidence that would disprove or counter any of the facts outlined above. Moreover, the Union did not call any witnesses, nor did it call the credibility of the Hotel's witnesses into question. Accordingly, the Union's admission that it refuses to bargain over six of the nine issues conclusively establishes that it has violated Section 8(b)(3), and an Order should be entered requiring the Union to cease and desist in its unlawful actions.

## II. The Union's Contract Interpretation Argument Fails On Evidentiary Grounds Because The Undisputed Facts Establish That The Six Issues It Refuses To Bargain Over Are All "Unique" To The Hotel Or "Pertain To" The Hotel

The Union's assertion that the phrase "unique or pertaining to the Employer" in Paragraph III of the Me Too Agreement transforms this dispute into a contract interpretation question that must be deferred to arbitration suffers from a fatal flaw – if the Hotel accepts the Union's proposed interpretations of the terms "unique" and "pertaining to," the undisputed evidence establishes that the six issues the Union refuses to bargain over are either "unique" to the Hotel or "pertain to" the Hotel and must therefore be negotiated.

The Union argued in its November 23, 2010 correspondence to the Hotel that the terms in question should be interpreted as follows:

> "Unique" of course means things that are only true at Ritz-Carlton and not elsewhere. "Pertaining" means a matter that is not a standard item throughout the industry but is something that specifically, although not uniquely, pertains to Ritz-Carlton. Since the Sheraton contract is the industry standard, the phrase "unique or pertaining to" can be implemented by a relatively simple test. If the subject is dealt with in the Sheraton agreement, then it is not unique or pertaining to the Ritz and need not be negotiated. If the matter is one that does not appear in the Sheraton agreement, then the union is obligated to keep negotiating about it.
>
> (GC Exh. 9).

Although the Hotel disputes the Union's proposed definitions of these terms, as well as its assertions regarding the Sheraton contract in general, assuming *arguendo* that the Union's definitions and assertions were controlling here, the evidence conclusively establishes that the Union is required to bargain over all six of the issues in question:

**Carving/Specialty Station Fee**

The Ritz currently pays employees a $65 shift premium in addition to their hourly pay each time that they work a carving/specialty station, and seeks to either reduce or freeze the premium amount. (GC Ex. 2). The summary of the recently negotiated 2009-2013 Sheraton

contract (which outlines the terms of the 2006-2009 Sheraton CBA that were revised during the now concluded negotiations) (the "Sheraton Summary") provides that "effective upon ratification, Carving Station Fees will increase from $25 to $50." (U. Ex. 3). Applying the Union's definitions above, since there is no provision in the Sheraton Summary for a $65 carving station fee, that fee is unique or pertains to the Ritz and the Union is obligated to negotiate with regard to the amount of that fee.

**Bell Attendants' Payment In Lieu Of Gratuity**

The Ritz currently pays Bell Attendants $5.00 in lieu of a gratuity whenever they deliver baggage to a vacant room, and seeks to reduce that amount. (GC Ex. 2). Neither the Sheraton contract (U. Exh. 1) nor the Sheraton Summary (U. Ex. 3) (collectively, the "Sheraton Agreement") provide for Bell Attendants to receive a payment in lieu of a gratuity for delivering baggage to a vacant room. Accordingly, this payment is, by the Union's definition, one that is unique or pertains to the Ritz and must be bargained over.[6]

**Housekeeper Scheduling**

The Ritz pays its Housekeepers for eight hours per shift, even though it only schedules them for 7.5 hours per shift and only requires them to work 7.5 hours during those shifts; The Hotel seeks to require them to work all eight of the hours that they are being paid for. (GC Ex. 2). The Sheraton Agreement does not provide for Housekeepers to be paid for eight hours while only being required to work 7.5 hours. Accordingly, this practice is, by the Union's definition, one that is unique or pertains to the Ritz and must be bargained over.

[6] Supplement VII to the Sheraton CBA provides for a service charge to be assessed in connection with porterage services provided to guests who stay in the Hotel as part of a tour group. For purposes of clarification, the Ritz notes that it is not seeking to alter or bargain over that tour group service charge, as that charge is wholly unrelated to the $5.00 vacant room delivery payment that Bell Attendants receive.

**Roll-away Bed Premium**

The Ritz pays all employees a $2.00 premium each time they make up a roll-away bed, regardless of their job classification. The Sheraton Agreement does not provide for employees outside the job classification of Room Attendant to receive a roll-away bed premium, nor does it provide for Room Attendants to receive a $2.00 premium. The Union is therefore required to negotiate over this issue because it is unique or pertains to the Hotel.

**Housekeeping Daily Room Quota**

The Hotel currently holds Housekeepers to a lower daily room quota (12 rooms maximum) than the Sheraton Agreement provides for, and seeks to increase those quotas to the contractual level (16 rooms maximum). Nowhere in the Sheraton Agreement is there a provision for Housekeepers' daily room quota requirements to be reduced to a level below the contractual quotas. Accordingly, such a reduction is unique or pertains to the Hotel and the Union must bargain over that issue.[7]

**New Employee Pay Rate**

The Ritz pays its new employees a higher hourly wage rate than the wage rates listed in the Sheraton Agreement. (GC Ex. 2). Because the Sheraton Agreement does not provide for new hires to be paid at wage rates higher than the hourly rates listed in the Agreement itself, this new hire wage premium is unique or pertains to the Ritz and must be bargained over.

For all these reasons, even if the Union were correct in its erroneous assertion that the parties' dispute turns on whether the six issues it refuses to bargain over are "unique" or "pertain to" the Ritz, there is no basis to defer this matter to arbitration. Accepting the Union's

[7] Alternatively, if it is the Union's position that no bargaining is required because the Hotel must abide by the 16 room maximum specified in the Sheraton Agreement rather than the 12 room maximum that the Hotel has implemented, the Hotel is willing to adopt the 16 room maximum and this issue is moot.

definitions of those terms negates any need for arbitral contract interpretations – the undisputed facts establish that all six issues in question fall under the Union's definitions of "unique or pertaining to."

## III. The Union Has Voluntarily Waived Its Right To Present Evidence On The Merits

The Union concedes in its brief that it did not call any witnesses or introduce any evidence at the hearing. Incredibly, its justification for failing to do so is that it "did not [want to] waste resources litigating the merits." (U. Brief at 20-21). After the General Counsel and the Hotel presented their cases at the hearing, the Union declined to present a defense. The Union's attorney stated that "we feel confident in our position" on the deferral issue and accordingly, rested on that procedural defense. (Tr. 235-36). She added that the Union may not even address the merits in its post-hearing brief, but that she would "need to consult with [the Union] on that" before making a decision. (Tr. 237). The Union's subsequent post-hearing brief did not address the merits of the Complaint and was limited to arguments related to deferral.

Based on its confidence in its position on deferral, the Union made a calculated tactical (and economic) decision not to mount a defense on the merits. The Union's confidence proved unwarranted, as the ALJ ruled against it on multiple legal and factual grounds. Unwilling to accept the inevitable outcome of its decision to mount little more than a cursory defense to the Complaint, the Union now asks the Board to consider, for the *fourth* time, the deferral argument that has already been rejected by the Region (at the charge stage), by the Board, and now by the ALJ. The Union further requests that if its deferral argument is rejected for a fourth time, it "be given an opportunity to present evidence regarding the meaning of the Me Too Agreement." (U. Brief at 28). There is no legal basis for the Union's request, however, as it voluntarily declined

to present evidence at the hearing despite being given every opportunity to do so, and that voluntary decision constitutes a waiver of its right to present evidence on the merits.[8]

## IV. There Is No Basis To Defer The Parties' Dispute To Arbitration

This dispute was conclusively resolved when the Union declined to raise any defense to the merits of the Complaint and refused to offer any evidence or testimony at the hearing. Accordingly, the undisputed facts outlined above suffice on their own to uphold the ALJ's decision and mandate that the Union return to the bargaining table without further delay. However, in the unlikely event the Board deems fit to reconsider the Union's thrice-rejected deferral argument, the ALJ's ruling must be upheld because that argument fails as a matter of law on multiple grounds.

### A. Deferral Is Inappropriate Because The Prerequisites To Deferral Established By *Collyer Insulated Wire* Cannot Be Met

Under *Collyer Insulated Wire*, 192 NLRB 837 (1971), the NLRB may defer a charge if the following conditions are satisfied: there is a longstanding bargaining relationship between the parties; there is no enmity by the employer toward the employees' exercise of rights; the employer manifests a willingness to arbitrate; the contractual grievance arbitration clause covers

[8] The Union cites to *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 785 (2006), for the proposition that a case should be remanded for further presentation of evidence following the rejection of a party's affirmative defense. However, the case supports no such proposition. In *Doubletree*, the parties reached a settlement agreement with regard to some, but not all allegations of the complaint prior to proceeding to hearing before an ALJ. Accordingly, there was no opportunity to present evidence related to those settled allegations at the hearing. The Board subsequently set aside the settlement agreement in part, on the grounds that there was no meeting of the minds regarding certain allegations that had purportedly settled. The Board then reinstated certain allegations that had been deemed settled, and remanded the matter to the ALJ for further proceedings. Unlike the parties in *Doubletree*, however, the Union was not precluded from presenting evidence on the merits during the initial proceedings. To the contrary – it chose not to present any such evidence at the hearing, and declined to do so again in its post-hearing brief. Accordingly, the circumstances warranting remand in *Doubletree* are wholly distinguishable from those in the instant case, and the ruling lends no support to the Union's request for remand.

the dispute at issue; and the contract and its meaning lie at the center of the dispute. In the present case, these conditions cannot be met.

### 1. Deferral is Prohibited Because the Hotel Does Not Have Access to the Contractual Grievance Procedure.

The Union's argument that the Charge is subject to deferral to arbitration fails as a matter of law because the Hotel does not have access to the contractual grievance procedure. It is well established in cases involving Section 8(b)(3) allegations that deferral is not permitted where the charging parties – namely, the employers – do not have access to the parties' contractual grievance procedure. *See*, *e.g.*, *Local No. 6-0682, Paper, Allied-Industrial Chemical and Energy Workers Int'l Union*, 339 NLRB 291 (2003) (NLRB held deferral inappropriate because the employer/charging party had no ability to invoke the grievance procedure to resolve a contractual dispute); *Communications Workers of Am.*, 280 NLRB 78 (1986) (NLRB denied motion to defer where collective bargaining agreement did not provide employers with access to grievance procedure).

The NLRB has determined that allowing a respondent union to waive this procedural defect and permitting a matter to proceed to arbitration "fundamentally" alters the parties' dispute resolution procedure. *Communications Workers of Am.*, 280 NLRB 78. It essentially relegates employers to grievance procedures to which they did not agree and allows unions to dictate the circumstances under which employers would have access to that process – a result that the NLRB resoundingly has rejected. Instead, in order for the NLRB's deferral doctrine to apply in cases alleging Section 8(b)(3) violations, a threshold showing must be satisfied that demonstrates that employers have access to the parties' grievance machinery. *Local No. 6-0682, Paper, Allied-Industrial Chem. and Energy Workers Int'l Union*, 339 NLRB 291 (2003) (employer/charging party's inability to invoke grievance procedure was sole reason for refusal to

defer); *Communications Workers of Am.*, 280 NLRB 78 (1986) (motion to defer denied solely on basis that employers lacked access to grievance procedure); *Communications Workers of America*, 204 NLRB 782 (1973) (even if respondent union's actions in other respects gave rise to a *Collyer*-type issue, NLRB still would not defer in light of fact that grievance arbitration machinery could not be invoked by employer). The NLRB simply does not permit deferral in cases where this access is lacking.

In the present case, deferral is wholly improper because the Hotel lacks the ability to invoke the grievance procedure. Despite the Union's assertions to the contrary at the hearing, neither the Me Too Agreement nor the Ritz's collective bargaining agreement (the "CBA") provide the Hotel with access to arbitration proceedings. Paragraph VI of the Me Too Agreement states that the Me Too Agreement "shall be enforceable in accordance with the procedures set forth in Section 46 of [the CBA]." Section 46(a) provides that a grievance may be initiated by "[a]ny employee or one of a group of employees, any Shop Steward, or any Local Union having a grievance." Accordingly, Section 46(a) limits access to the grievance process to employees and the Union – it does <u>not</u> provide the Hotel with access to that process. To the contrary, the plain language of the CBA prevents initiation of a grievance by the Hotel or on behalf of the Hotel.

Although the Union repeatedly referenced Section 46(f) of the CBA as providing that the Hotel can advance a matter to arbitration, that section explicitly states that the only dispute the Hotel could refer to arbitration **is one that has gone through all the preceding steps of the grievance process**. In other words, until the first four steps of the grievance process (outlined in Sections 46(a) through (d) of the CBA) have been exhausted, Section 46(f) is not even implicated. Since Section 46(a) does not provide the Hotel access the first step in the grievance

process, it is axiomatic that the Hotel cannot access the subsequent steps in that process, let alone the final step (arbitration) established by Section 46(f).

The Hotel's inability to demand arbitration is further underscored by Section 45 of the CBA (entitled "Arbitration"). Section 45 states that "[d]ifferences of opinion between representatives of the Employer and…[the Union]…may become the subject of arbitration **only after all steps of the grievance procedure have been utilized and failed to produce accord between the parties**." Moreover, the parties' past practice further reinforces this conclusion; at no time during the existence of its collective bargaining relationship with the Union has the Hotel ever filed a grievance pursuant to any contractual grievance procedure. Indeed, Johansen testified during the hearing that "the grievance mechanism was designed so the Union made the call whether or not to go to arbitration, so the Ritz wasn't a party in that. (Tr. 114). He further testified that "[t]he Union **always** initiates the grievances" and that it "wasn't [within the Hotel's] purview to do so under the collective bargaining agreement." (Tr. 114-15).

In his ruling, the ALJ rejected the Hotel's contention that it lacked (and still lacks) the ability to demand arbitration in a dispute such as this one. Notably, the ALJ agrees with the Hotel and the General Counsel that the Ritz cannot invoke arbitration through Section 45 of the CBA, which encompasses virtually all disputes that may arise between the Hotel and the Union. However, the ALJ noted that the subcontracting provision of the CBA (Section 6) allows either party to invoke arbitration in the event a subcontracting dispute cannot be resolved, and concluded that such access "disposes of the claim that the Employer lacks any right of access" to the grievance arbitration mechanism. (ALJ at 20). But in identifying this language as a basis to conclude the Hotel has access to the contractual grievance arbitration procedure, the ALJ improperly expanded a very narrow and specific provision of the CBA that serves a finite

purpose. The parties agreed that the Hotel would *not* have access to the contractual grievance procedure but for one narrow exception – in cases where there is a dispute over subcontracted work being performed in the Hotel. To address such disputes, the parties have established an expedited arbitration process, which is subject to strict procedural and evidentiary rules and may only be heard by one of two named arbitrators. This expedited arbitration process bears no relation to the broad grievance arbitration process established by Section 45, nor does it somehow gain the Hotel access to that broader process.

Although the ALJ held that the presence of an expedited arbitration process in Section 6 establishes that the "placement of the arbitration provisions in the contract section governing grievances is merely a matter of convenience and does not carry substantive implications," it evidences just the opposite. Indeed, the fact that the parties created an expedited arbitration process accessible by both parties for one (and only one) particular type of dispute makes it clear that there are significant substantive implications to the placement of arbitration-related language in the CBA. Had the parties intended to allow the Hotel access to arbitration in any and all disputes, they would have included the mutual access language from Section 6 in Section 45. They did not do so, however, and the ALJ is not empowered to impose such a fundamental alteration on the parties' dispute resolution procedures. *Communications Workers of Am.*, 280 NLRB 78. Because the Hotel lacks the ability to invoke the grievance procedure and demand arbitration, the Union's deferral request must be denied as a matter of law.

### 2. Deferral Is Inappropriate Because The Contract and Its Meaning Do Not Lie At The Center Of The Parties' Dispute

#### a. The Parties' Dispute Arises From The Union's Actions Rather Than A Question Of Contract Interpretation

Where the gravamen of the allegations is not misinterpretation or misapplication of contract terms, but an alleged course of conduct that evidences bad faith and an attempt to undermine another party's rights, such allegations are inappropriate for deferral. *United Tech. Corp.*, 274 NLRB 504, 510-11 (1985). Here, the Union offered no evidence whatsoever to refute the facts that: (1) the Hotel advised the Union that it would not sign the Me Too Agreement unless that agreement preserved the Hotel's right to negotiate over nine specific areas where its practices exceeded the CBA's requirements; (2) the Union agreed to engage in such negotiations, on the condition that the Me Too Agreement would only refer to the nine items generally rather than explicitly listing them, so that it could avoid a backlash from the other me too hotels; (3) the Hotel's use of the word "unique" in Paragraph III of the Me Too referred to nothing more than the fact that the nine issues to be negotiated were all established practices in place at the Ritz that differed from its contractual obligations related to those issues under the CBA; and (4) the Hotel inserted that general description only because the Union refused to include a list specifying the nine items.

Incredibly, after the Union conditioned its agreement to bargain over the nine issues upon the inclusion of this language in the Me Too Agreement, it now argues that very language should be interpreted to negate its duty to bargain over six of the nine issues. The Union's argument that Paragraph III (or for that matter, any other provision) of the Me Too Agreement excuses its duty to bargain finds no support in the undisputed facts. To the contrary, the Union's argument is undermined by its own actions during the parties first two bargaining sessions.

Indeed, it is undisputed that in response to the Hotel's initial proposals related to each of the nine issues on September 24, 2010, the Union made numerous, detailed information requests regarding all nine of those issues. On October 11, 2010, the Union memorialized and expanded upon those requests through a written information request. (GC Ex. 5). The Union's requests were numbered 1 through 9, with each request containing multiple subparts regarding that particular topic. The Hotel provided extensive information in response to those requests in order to facilitate the parties' continued bargaining. At the second bargaining session on October 21, 2010, the Union collected additional information responsive to its requests regarding all nine issues before, inexplicably, asserting that it had no obligation to bargain over most of those issues. The breadth and specificity of the Union's nine categories of information requests belie its claim that the parties never agreed to bargain over nine issues.

**b. Even If The Contract Language Were At Issue, The Nature Of The Parties' Dispute Renders Deferral Inappropriate**

Importantly, even where a Respondent's defenses to a refusal to bargain allegation raise material issues of contract interpretation, the parties' dispute may still be deemed wholly inappropriate for deferral. *AMF, Inc.*, 219 NLRB 903, 912 (1975). Indeed, where the questions presented by the complaint relate to a breakdown in contract negotiations rather than a routine contract violation, the Board has declined to defer such matters to arbitration. *Id., citing Mountain States Constr. Co.* 203 NLRB 1085 (1973) (declining deferral where conduct at hand constituted a "complete rejection of the principles of collective bargaining"). This is logical, as "[t]he Board has recognized its own special competence in dealing with unfair labor practice issues emerging from a serious disruption to the negotiating process. The withholding of *Collyer* in such circumstances, seems absolutely sound." *AMF, Inc.*, 219 NLRB at 912. Moreover, the

necessity for expedient resolution of such bargaining disruptions is threatened by deferral to the arbitration process. *Id*.

Here, the parties' dispute does not emanate from a routine disagreement over whether the language of the CBA prohibits certain scheduling practices or renders a particular disciplinary action inappropriate. Instead, it stems from the Union's wholesale rejection of its bargaining duties. The Union's actions have resulted in a serious disruption to the parties' negotiations, and dealing with such unfair labor practices falls squarely within the Board's purview (and entirely outside that of a private arbitrator). Accordingly, this matter is not inappropriate for deferral and the Union's *Collyer* argument is without merit.

### B. Deferral is Inappropriate Because the Union Has Abrogated its Duty to Bargain in Good Faith.

The NLRB has consistently held that deferral is inappropriate where the party seeking deferral has acted in total disregard of its collective bargaining obligations. *See*, *e.g.*, *Servomation Corp.*, 271 NLRB 1112 (1984) (recognizing that NLRB does not defer where there are allegations involving same); *Communications Workers of Am.*, 204 NLRB 782 (1973) (deferral inappropriate where union repudiated its obligation under parties' agreement); *Borden Inc.*, 196 NLRB 1170 (1972) (deferral inappropriate where dispute arose during bargaining and parties failed to meet their obligations to negotiate in good faith). In this case, the Union does not merely dispute its obligations under the Me Too Agreement, but instead has repudiated altogether its obligation under that agreement to bargain over a host of issues. The Union has taken actions and adopted positions demonstrating in no uncertain terms that it does not consider itself bound by the Me Too Agreement. In doing so, it has renounced its collective bargaining obligations, thereby rendering deferral wholly inappropriate in this matter.

### C. Deferral To Arbitration Following Trial Is An Unjustifiable Waste Of Time and Resources That Is Contrary To Public Interest

As noted above, deferral of disputes that meet the *Collyer* prerequisites is not mandatory, and the Board has ruled on many occasions that disputes were inappropriate for deferral based upon the underlying facts and procedural postures of those disputes. One such instance is when extensive litigation of the dispute has already been concluded. Indeed, the Board has noted that:

> [O]nce the General Counsel's office has invested money and staff resources in a "full" merits investigation and has then prepared for full litigation before a judge, the current policy which generally encourages the "private" resolution of labor disputes should yield to another compelling public interest – that these merits be determined promptly and with finality in the Board forum which Congress has provided, rather than being belatedly shunted aside to a private disputes-resolution system which may or may not dispose of the statutory issue with finality.

*Santa Cruz Convalescent Hosp., Inc.*, 300 NLRB 1040, 1044 (1990).

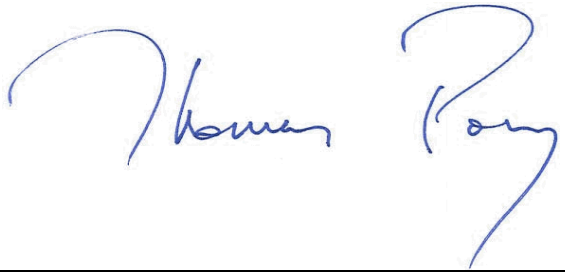
Here, setting aside the parties' disagreements over whether this matter *can* be deferred to arbitration, there is a larger consideration as to whether it *should* be deferred. The General Counsel's office has already invested significant economic and staff resources into its investigation of the Charge and the subsequent trial, the Board has considered a fully-briefed motion for summary judgment, the Judge has presided over the hearing, reviewed briefs from each party, and issued a lengthy written ruling. Given the amount of time and public resources already devoted to this dispute in administrative proceedings, it is in both the public interest and the parties' interest to resolve this matter promptly and with finality rather than simply deferring it to arbitration.

## CONCLUSION

For all the foregoing reasons, the Ritz-Carlton Chicago respectfully submits that UNITE HERE Local 1 has refused to bargain in violation of Section 8(b)(3) of the Act and the sound ruling of Administrative Law Judge Buxbaum should be upheld in its entirety.

Respectfully submitted,

THE RITZ-CARLTON CHICAGO



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## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a copy of the foregoing **THE RITZ-CARLTON CHICAGO'S BRIEF IN OPPOSITION TO THE UNION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECEMBER 5, 2011 FINDINGS AND RECOMMENDED ORDER** to be served upon the parties listed below via electronic mail and by depositing a true and correct copy of same, postage prepaid, in the U.S. Mail chute at 300 South Wacker Drive, Chicago, Illinois, on this 24th day of January, 2011:

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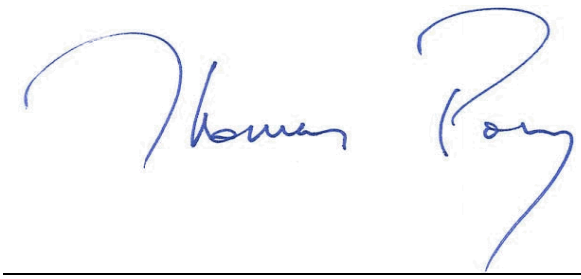

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